STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Court of Appeals

MARCIA SNIECINSKI,

Plaintiff-Appellee,

v.

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

Supreme Court Docket No. 119407
Court of Appeals No. 212788 C
Lower Court No. 96-616254-CZ

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BRIEF ON APPEAL OF AMICUS CURIAE MICHIGAN CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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Dated: October 25, 2002

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STATEMENT OF BASIS OF JURISDICTION

The Michigan Chamber of Commerce ("this Amicus" or the "Chamber") contends that this Court has jurisdiction over Defendant-Appellant Blue Cross Blue Shield of Michigan's ("defendant" or "BCBSM") appeal under MCR 7.301(A)(2) and MCR 7.302(B)(2), (3) and (5). Defendant appeals from a decision of the Court of Appeals refusing to reverse the trial court's denial of its post-trial motions for new trial, judgment notwithstanding the verdict, or remittitur. This Court granted leave to appeal by Order dated April 30, 2002.

The Chamber also contends that Plaintiff-Appellant Marcia Sniecinski ("plaintiff") has waived any appeal to this Court on the issue of whether defendant properly preserved its affirmative defense that plaintiff failed to mitigate her damages. Plaintiff failed to file a cross appeal on the issue with the Court of Appeals. The timely filing of a claim of cross appeal in the Court of Appeals, like the timely filing of a claim of appeal, is jurisdictional, MCR 7.204 and MCR 7.207. The Court of Appeals properly declined to exercise jurisdiction over the issue, consistent with precedent. See, e.g., *Kordich v Butler Aviation*, 103 Mich App 566; 303 NW2d 238 (1981) (appellate review precluded by plaintiff's failure to file cross appeal on issue that defendant had failed to include affirmative limitations defense in first responsive pleading). In her responsive brief on appeal, plaintiff acknowledges that the trial court denied her Motion in Limine seeking to preclude defendant from introducing evidence at trial of her failure to mitigate her damages. From that denial, plaintiff should have cross-appealed, because she sought on appeal, not merely to negate issues on mitigation raised by defendant, but to obtain a more favorable decision that she had obtained below: a preclusion of defendant from raising any mitigation issues whatsoever based upon waiver of that defense. Her failure to file a cross

appeal was jurisdictional. A plaintiff who fails to file a cross appeal is limited to the issues enumerated by the defendant. *Barnell v Taubman Co*, 203 Mich App 110, 112; 512 NW2d 13 (1993). Because plaintiff did not preserve the issue of defendant's purported waiver of the mitigation defense, for appeal in the Court of Appeals, this Court does not have jurisdiction over that issue.

For a separate and independent reason, however, this Court also lacks jurisdiction over the issue of defendant's purported waiver of its affirmative defense. In this Court, plaintiff also failed to file a cross appeal on the issue of the purported waiver.

STATEMENT OF QUESTIONS INVOLVED

1. Whether this Court should vacate that portion of the jury verdict reflecting any economic damages from the date that plaintiff quit her subsequent job (non-group marketing representative) with Blue Care Network ("BCN"), where the Court of Appeals properly found that plaintiff was not constructively discharged from that job?

   Defendant answered: "Yes."

   This Amicus answers: "Yes."

   Plaintiff answered: "No."

2. Whether this Court should vacate that portion of the jury verdict reflecting economic damages, where the Court of Appeals clearly erred in concluding that plaintiff (a former BCN insurance telemarketer) fulfilled her duty to mitigate damages by quitting suitable alternate employment, removing herself from the labor market altogether, and returning to school on a far less than full-time basis, taking martial arts courses and sign language courses, rather than courses to improve her ability to get a job in the insurance field?

   Defendant answered: "Yes."

   This Amicus answers: "Yes."

   Plaintiff answered: "No."

3. Whether this Court should conclude, as did the Court of Appeals below, that plaintiff failed to properly appeal whether defendant's failure to include the affirmative defense of failure to mitigate in its first response pleading precluded defendant from presenting proofs on that issue at trial?

   Defendant answered: "Yes."

   This Amicus answers: "Yes."

   Plaintiff answered: "No."

4. Whether this Court should reverse the decision below and vacate that portion of the jury verdict reflecting non-economic damages, where plaintiff's non-economic damage award in an amount four times her annual salary was based on insufficient evidence of injury, and where plaintiff failed to establish the nexus between her claimed emotional distress damages and the sting of discrimination?

   Defendant answered: "Yes."

   This Amicus answers: "Yes."

   Plaintiff answered: "No."

5. Whether this Court should reverse the decision below and vacate the jury verdict against defendant, because the Court of Appeals clearly erred in articulating the burden of proof in a direct evidence discrimination case and in upholding the jury verdict on insufficient and/or irrelevant direct evidence, i.e., the isolated remarks of a former supervisor not employed by defendant, and not involved in the alleged discriminatory decision?

   Defendant answered: "Yes."

   This Amicus answers: "Yes."

   Plaintiff answered: "No."

6. Whether this Court should reverse the decision below and vacate the jury verdict against defendant, where the Court of Appeals clearly erred in articulating the burden of proof in a pregnancy animus discrimination case, where the alleged animus of a former supervisor did not result in an adverse employment action, and/or where defendant's reasons for its conduct (uniformly applied policies) were not pretextual?

   Defendant answered: "Yes."

   This Amicus answers: "Yes."

   Plaintiff answered: "No."

7. Whether this Court should reverse the decision below and vacate the jury verdict against defendant, because reasonable minds could not differ, based upon the record adduced at trial, that, even in the presence of discriminatory animus, the same events would have occurred, where plaintiff's job offer resulting from corporate restructuring expired when she was administratively separated as a BCN employee (as provided under a uniformly administered medical leave policy) because she was unable to return to work she had exhausted short-term disability leave?

Defendant answered: "Yes."

This Amicus answers: "Yes."

Plaintiff answered: "No."

I. STATEMENT OF MATERIAL PROCEEDINGS BELOW

This Amicus incorporates Defendant's "Statement of Material Proceedings Below" as if set forth in full in this brief.

II. STATEMENT OF MATERIAL FACTS

This Amicus incorporates Defendant's "Statement of Material Facts" as if set forth in full in this brief.

The Chamber represents more than 6,000 Michigan employers and employer groups, including local chambers of commerce, trade and professional associations, corporations, partnerships, proprietorships and individuals engaged in business, industry and the professions. The Chamber represents its members through various means, including representing its members in matters of paramount importance before the courts, the federal and Michigan legislatures, and state agencies. On occasion, the Chamber represents its members before this Court by appearing as an amicus curiae in cases of great concern, pursuant to leave granted. The Chamber believes that it is in the best interests of Michigan employers and business that the Court of Appeals Opinion in this matter be reversed and the jury verdict vacated.

III. ARGUMENT

SUMMARY OF ARGUMENT

As the law instructs, Blue Care Network (not a defendant in this case) treated plaintiff, on disability leave for five months due to pregnancy, just as it would any other employee on disability leave. Below and on appeal, plaintiff essentially sought preferential treatment because her disability leave was pregnancy-related. She contended below, and convinced a jury, that the parent (defendant BCBSM) of the subsidiary (BCN) where she had worked prior to her short-term disability leave should have placed her in a new position in the BCBSM marketing department some nine months after she began her leave, even though she could not return to work after she had exhausted her short-term leave time. Had the parent company done so, it would have breached the terms of the uniformly applied short-term disability policy under which all BCN employees who could not physically return to work after five months on short-term disability leave were administratively separated. Moreover, exhaustion of short-term disability leave without returning to work constituted an eligibility condition for long-term disability benefits under the ERISA-governed BCN LTD Plan, the terms of which neither BCBSM nor BCN could vary. As a result of the administrative separation in November, plaintiff then had the status of external candidate in March of 1994 when she could return to work, at which time BCBSM had imposed a hiring freeze for external candidates, again uniformly applied, in order to provide work for internal candidates affected by shifts in Medicare reimbursement.

In support of her contention that she should have received such preferential treatment by being hired into the BCBSM marketing position six months after the corporate restructuring and nine months after she began her short-term disability leave, plaintiff bootstrapped the alleged

pregnancy animus of her former BCN supervisor, betrayed in alleged direct remarks, onto a supposed "decision" to "discharge" her from a position she had never occupied, and from a separate employer (defendant BCBSM) for whom she did not work.

In a divided opinion with one judge concurring in result only, the majority below permitted an inference to be drawn from "direct evidence" remarks of plaintiff's prior BCN supervisor, even though he did not even participate in the processing of plaintiff's administrative termination from BCN. Far from preventing plaintiff from receiving a job offer for the BCBSM marketing position (which she unfortunately proved unable to assume), the supervisor gave plaintiff satisfactory performance reviews, allowed her all requested time off for pregnancies, and participated on the interview panel that actually offered her the new position with defendant, with the understanding that she would adhere to uniformly applied attendance policies. In fact, that panel (on which that supervisor sat) also recommended the post-merger placement of another pregnant BCN employee into the BCBSM marketing department, hardly an indication of pregnancy animus. At trial, plaintiff could identify only a few remarks (assumed made for the purpose of argument) so ambiguous and/or remote and made by an employee who did not make the "decision" or decisions in issue that this Court should hold, following the four-factor test in *Krohn v Sedgwick James of Michigan*, 244 Mich App 289; 624 NW2d 212 (2001), that the evidence proffered by plaintiff did not rise to the level of direct evidence which, if believed, would require the conclusion that unlawful discrimination constituted at least a motivating factor in the alleged "decision" in issue. *Hazle v Ford Motor*, 464 Mich 456, 464; 628 NW2d 515 (2001). Nor did the record evidence at trial establish a nexus between the alleged pregnancy-related remarks by or conduct of her former BCN supervisor and any adverse employment action: when plaintiff finally recovered the ability to work nine months following the

commencement of her leave, a uniformly applied external hiring freeze for all open BCBSM positions precluded her placement in the marketing position she would have occupied had she become a BCBSM employee during the restructuring. Finally, plaintiff could not establish pretext at trial or that the same "decisions" would not have occurred even in the absence of alleged pregnancy discrimination, given the uniformly administered short- and long-term disabilities policies, and given the fact that another pregnant employee of BCN (Renee Cole) who actually reported to work at BCBSM on November 22, 1993, received a BCBSM position after the corporate restructuring (Def. App. 457-458). *Harrison v Olde Financial*, 225 Mich App 601, 611-612; 572 NW2d 679 (1997).

Whether this Court affirms or reverses the jury verdict on liability (and this Amicus urges it to vacate the verdict), it can and should nonetheless reach the issue of mitigation of damages. Plaintiff could not physically return to work until March of 1994, at which point she had received long-term disability benefits and had been administratively separated at the expiration of her short-term disability leave, as provided in the uniformly applied BCN disability leave policy). As an external candidate, she was not eligible a posted BCBSM AR position because of a hiring freeze on external candidates. BCN (and not BCBSM) did rehire plaintiff in a different position, and she remained employed for two years until she voluntarily quit September of 1996. As plaintiff admitted at trial, after she quit the subsequent BCN position, she did not make any effort to look for any other work and did not complete any applications for employment. Significantly, the panel below expressly and correctly found that she had not been compelled to resign and that she was not constructively discharged. Had a completely different employer hired plaintiff following her administrative separation from BCN, and had she voluntarily quit that subsequent position, any economic damages after her voluntary resignation would flow from

her resignation, and not from the first job loss. However, apparently because BCN employed plaintiff twice, the panel below considered the job search she conducted some two years prior to her resignation when it considered whether she had fulfilled her duty to mitigate, simply because the panel sought to justify plaintiff's return to school on a sporadic basis after her resignation to take completely unrelated classes.

Mindful that this case will be cited beyond its factual underpinnings to cases where former employees voluntarily quit subsequent employment with different employers, this Court should conclude that plaintiff did not and could not fulfill her duty to mitigate avoidable losses after her voluntary resignation with a job search conducted two years earlier. Moreover, this Court should find that the panel below erroneously shoehorned this case into an exception from the duty to mitigate arising where plaintiffs, after diligent and focused job searches, return to school full-time in order to improve their chances of employment in like employment from the employment they had been denied. Here, plaintiff removed herself from the work force altogether to take occasional college courses unrelated to the insurance field. In short, plaintiff unreasonably failed to avoid economic loss, particularly where she returned to school on such a part-time basis that she could have continued working in the subsequent BCN position or sought like employment while attending classes. Under these circumstances, this Court should send a clear signal to plaintiffs that, where they admit that they have left the job market altogether and/or where they voluntarily quit subsequent employment, they have failed to avoid economic loss and risk cutting off economic damages. *Morris v Clawson Tank Co*, 459 Mich 256, 266; 587 NW2d 253 (1999).

Furthermore, under the narrow circumstances of this case, this Court should formulate the employer's burden of demonstrating that the employee failed to mitigate to relieve the employer

of submitting wasteful proofs. Where a plaintiff admits that she has removed herself completely from the labor market and returned to school after voluntarily quitting a job, then the employer should not be forced to put on proofs of job availability, proofs that would constitute a waste of time since plaintiff admittedly would not have taken advantage of any such job opportunities. MRE 403. Alternatively, this Court should find that BCN satisfied its burden of demonstrating that plaintiff failed to mitigate her economic damages when it showed 1) the availability of employment in the form of the subsequent job occupied by plaintiff for two years until she quit, 2) plaintiff's failure to mitigate by quitting and 3) plaintiff's intention not to mitigate at all, as demonstrated by her returning to school on a part-time sporadic basis, rather than continuing a job search.

The panel below achieved no majority on the issue of emotional distress damages; however, because one judge concurred in result only, an award of $90,000 of emotional distress damages remaining standing. This Court should adopt the better-reasoned test for such damages articulated in the dissenting opinion below, particularly in cases such as the case at bar where plaintiff offers thin and vague subjective evidence of humiliation from coworker questions and no expert opinion in support of the proposition that her emotional distress damages flowed from the sting of discrimination, rather than the discomfort associated with job loss. *Slayton v Michigan Host*, 122 Mich App 411, 416; 332 NW2d 498.

A. THIS COURT SHOULD REVERSE THE ERRONEOUS DECISION BELOW AFFIRMING LIABILITY

In *Hazle*, *supra*, this Court defined direct evidence in *obiter dictum*, as it analyzed plaintiff Hazle's case under the *McDonnell Douglas* burden of proof paradigm in circumstantial

evidence cases. Below, the majority analyzed this case as a direct evidence case but erroneously concluded that an administrative separation at the end of a leave constituted an adverse employment action and that remarks by a former supervisor rose to the level of direct evidence sufficient to support the jury verdict below.[1]

1. STANDARD OF REVIEW

This Court reviews the denial of a motion for new trial or judgment notwithstanding the verdict under the same test employed by the trial court. The standard of review thus requires that the Court resolves any legitimate inferences from the evidence in a light most favorable to the non-movant in order to determine whether a factual question exists about whether reasonable minds could differ so that submission to the factfinder is warranted. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995); *Matras v Amoco Oil Co*, 474 Mich 675, 681; 385 NW2d 586 (1986). If the evidence so viewed fails to establish a claim as a matter of law, then directed verdict or judgment NOV should be entered. *Forge, supra; Orzel, supra; Matras, supra.* As then Judge Taylor noted in *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997), that both the trial court and the appellate court apply the same test suggests that the standard of review is *de novo*, and not an abuse of discretion standard, as plaintiff erroneously contends.

[1] Defendant BCBSM argues in its brief on appeal that the Court of Appeals erroneously evaluated the direct evidence in this case as sufficient and therefore erroneously labeled this case a direct evidence case. Because of that error, defendant suggests that this case should be analyzed and found wanting under the *McDonnell Douglas* paradigm.

2. LACK OF ADVERSE EMPLOYMENT ACTION AND/OR SUBJECTIVE BELIEF OF DISCRIMINATION

It is beyond dispute in this case that the alleged discriminatory animus of a former supervisor did not preclude plaintiff from receiving a job offer for a new position with BCBSM upon corporate restructuring. It is also undisputed that plaintiff did not even hold a subjective belief that the other two supervisors on the interview panel, one of whom would have become her new supervisor, discriminated against her on the basis of pregnancy. Plaintiff did not contend that any alleged discriminatory animus caused her to take disability leave, a leave occasioned by lengthy pregnancy complications, nor did plaintiff dispute the uniform application of BCN short-term disability leave and LTD policies.

This Court should correct the majority's erroneous identification of an adverse employment "decision" and its erroneous formulation of the burden of proof in "direct evidence" disparate treatment cases, where, as here, the uniform application of neutral policies provides either a non-pretextual business reason or a permissible mixed motive for the questioned employment action(s). A plaintiff alleging pregnancy discrimination should not enjoy a different burden of proof or a lower threshold of proof than a plaintiff alleging disparate treatment based upon handicap or any other form of discrimination, particularly where she cannot objectively demonstrate a nexus between the animus and the alleged failure to hire.

As a threshold issue in any disparate treatment case, including "direct evidence" cases, a plaintiff should be required to demonstrate an adverse employment action. Here, as required under BCN's uniformly applied medical leave policy and consonant with the terms of its ERISA-governed LTD Plan, Human Resources personnel processed plaintiff's administrative separation from active employment, effective March 1, 1994, after five months of short-term medical disability. As a result, plaintiff fulfilled one eligibility requirement under the LTD Plan. During

her short-term disability leave in November of 1993, plaintiff's position as a BCN telemarketing representative and all of the other positions in the BCN marketing group were eliminated. The job offer plaintiff received to become BCBSM account representative ("AR") expired as a result of her inability to return to active work at the end of the short-term leave, when she ceased to be an active BCN employee and when she began to receive long-term disability. That position, like all other BCBSM positions, remained under an external hiring freeze when plaintiff could finally return to work, and BCBSM notes that plaintiff did not even apply for the position when the freeze lifted.

In two other decisions of the Court of Appeals (i.e., the special panel decision in *Lamoria v Health Care Corp*, 233 Mich App 560; 593 NW2d 699 (1999) (incorporating salient portions of the prior *Lamoria* decision portion, 230 Mich App 732 at 811-812), and in *Moorehead v Comerica Bank*, Court of Appeals No. 203675 (October 31, 2000) [Ex. 1], the Court of Appeals had previously held that, in cases of administrative separation without rehire under uniformly applied medical and LTD policies and/or plans, such neutral policies constitute legitimate and non-pretextual business reasons for allegedly discriminatory conduct.

The opinion below erroneously termed the failure to hire plaintiff into the BCBSM AR position after her short-term medical disability leave a discriminatory "decision to discharge plaintiff from the AR position." (Def. 48a).

3. INCORRECT FORMULATION OF BURDEN OF PROOF

Compounding its erroneous identification of a purported adverse employment action, the majority below incorrectly merely recited the burden of proof formulation in discriminatory treatment cases enunciated in *Harrison v Olde Financial*, 225 Mich App 601; 572 NW2d 679

(1997) (Opinion by J Young, joined by then J Taylor and Livo, sitting by designation), but failed to apply the formulation correctly. Imputing to the anticipated new employer (BCBSM) the alleged pregnancy animus of a former marketing supervisor who had neither participated in the processing of plaintiff's administrative separation nor who would become plaintiff's supervisor in the BCBSM marketing department, the majority erroneously concluded that "the evidence was sufficient to show that [the former supervisor] Curdy acted on a discriminatory predisposition when plaintiff was discharged from the AR position." (Def. 49a) Notwithstanding any purported pregnancy-related remarks by the former supervisor (some of which were ambiguous at best and related to attendance concerns, and some of which were two years earlier) during the first interview for the AR job, the interviewers offered plaintiff the job. Moreover, the majority footnoted, but did not appreciate, the significance of plaintiff's ineligibility for the BCBSM job at the time of the corporate restructuring, when she was physically unable to return to work and had been administratively separated under the uniformly administered BCN leave policy.

In contrast to the erroneous formulation in the opinion below, writing for the Court of Appeals in *Harrison*, then Judge Young carefully noted that, in cases of alleged discriminatory animus, whether established by direct or by circumstantial evidence, "whatever the nature of the challenged employment action, the plaintiff must establish evidence of the plaintiff's qualification (or other eligibility) and direct proof that the discriminatory animus was causally related to the decision[-]maker's action." 225 Mich App at 613. Only upon such a presentation of proofs must a case "ordinarily" be submitted to the fact-finder. Id.

The majority below conflated that proof requirement into the following erroneous formulation: "[O]nce the plaintiff has submitted direct evidence of discrimination, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims

are true. [citing *Harrison* at 613]." (Def. Ex. 3, p. 2) Here, plaintiff was not qualified at the time of the corporate restructuring to assume the BCBSM AR marketing position, as was the other pregnant BCN employee affected by the merger. In November of 1993, plaintiff simply could not return to work. Moreover, the supervisor whose remarks she lists did not participate in her administrative separation and did not impose a hiring freeze on external candidates after Medicare reimbursements changed; therefore, plaintiff's proofs at trial, except for vague and conclusory assertions of subjective belief, did not demonstrate any nexus between the claimed remarks and the alleged adverse "decision" or "decisions."

In addition, the *Harrison* court also recognized and subsumed into Michigan law the mixed motive defense articulated in *Mt Healthy Bd of Ed v Doyle*, 429 US 274; 97 S Ct 568; 50 L Ed 2d 471 (1977), even in direct evidence cases. *Harrison*, 225 Mich App at 611-612. See also: *Rollert v Dep't of Civil Rights*, 228 Mich App 534; 579 NW2d 118 (1998). As noted in *Harrison*, the Sixth Circuit has applied the *Mt Healthy* test to liability determinations, so that, if the employer can show that the same decision would have been reached even in the absence of discrimination, no liability arises. 225 Mich App at 611, citing *Haskins v United States Dep't of the Army*, 808 F2d 1192, 1197-98 (CA 6, 1987). Where, as here, plaintiff herself has failed to show any nexus between the alleged remarks and any action taken by either the BCN HR personnel or the BCBSM personnel, and where the record is undisputed that the policies in issue (both the medical leave policy, the LTD plan, and the hiring freeze policy) were uniformly administered as to pregnant and non-pregnant employees alike, then BCBSM met its burden of persuasion.

This Court should reverse the majority opinion below as erroneous on the separate and independent grounds that the majority completely misstated the formulation of the burden of proof in direct evidence cases and the standard under which such cases become jury-submissible.

4. ADOPTION OF THE FOUR-FACTOR TEST

This Amicus also urges this Court to adopt the four-factor test followed in Michigan appellate courts and in the Sixth Circuit when it reverses the decision below, a decision which erroneously found sufficient "direct evidence" of alleged pregnancy-based remarks by a supervisor employed, not by defendant, but by BCM. The remarks enumerated below were too ambiguous and/or too remote in time to demonstrate any nexus with the alleged "decision" to "discharge" plaintiff from the BCBSM AR position. Instead, in reversing the liability decision of the panel below, this Court should adopt the four-factor test for direct evidence articulated by the Sixth Circuit in direct evidence discrimination cases and followed in *Krohn*. See: *Cooley v Carmike Cinemas, Inc*, 25 F3d 1325 (CA 6 1994).

The record below reflected little more than plaintiff's subjective belief that earlier remarks by her prior supervisor, who participated on the panel that actually made plaintiff the job offer, somehow infected or tainted the minds of the other two members of the panel. This Court has held that a mere subjective belief of discrimination on the part of a plaintiff does not create a jury-submissible issue. *Hazle*, 464 Mich at 476; *Quinto v Cross and Peters Co*, 451 Mich, 358, 371; 547 NW2d 314 (1996). Equally significantly, this Court has also held that, in cases of position elimination, direct evidence of remarks showing a discriminatory animus, without more, would be insufficient to sustain a jury verdict of discrimination, particularly where the remarks, as here, seem ambiguous or by persons other than the purported decision-maker. *Matras,*, 424 Mich at 685-686. Here, the trial record contains no evidence showing that the remarks of

plaintiff's former BCN supervisor tainted any action of the other two members of the interview panel, who offered her the AR job, and who offered another position to another pregnant BCN employee, Renee Cole. Nor, contrary to the majority's conclusion below, does the trial record demonstrate that the supervisor's alleged discriminatory remarks (or his conduct in trying to place an attendance warning in her file, upon which the panel so heavily relied) tainted the actions of either the BCN HR personnel who processed plaintiff's administrative separation, the BCN HR manager who refused to accede to the supervisor's request to place a "threat" or warning in her file, or the BCBSM HR personnel who adhered to the hiring freeze and to the medical leave policy, which required plaintiff (as in *Moorehead*) to reapply for employment in the AR position once the freeze lifted.[2] In *Matras*, this Court found that alleged discriminatory remarks by those who did not make the alleged discriminatory "decision" simply did not establish that a protected status (there, age; here, pregnancy) operated as a determining factor in the complained of conduct. 424 Mich at 685.

Here, too, the record is devoid of the "something more" found sufficient to sustain the jury verdict in Matras: a discriminatorily drawn reduction in force plan. The trial record here undisputedly establishes that plaintiff's position, along with all of the others in the BCN marketing department, was eliminated in a corporate restructuring. The trial record also establishes that plaintiff was administratively separated by BCN HR personnel, and not by the supervisors whose remarks she cites, when she failed to return from short-term disability leave, as provided under the uniformly administered BCN medical leave policy and LTD plan. See, *LaMoria, supra.* The trial record further establishes that, when plaintiff became physically able to return to work many months after her administrative separation, an external hiring freeze

[2] Even plaintiff admits, in her brief on appeal, that she did not submit a BCN application for the BCBSM AR position in accordance with the medical leave policy.

precluded the filling of the disputed AR position in issue by plaintiff or any other external candidate. In *Matras*, in contrast, plaintiff challenged the company's force reduction plan because it contained a quota system of layoffs by protected groups and granted exceptions. Despite the ill-conceived plan, this Court did articulate the general principle, ignored by the majority below, that even in a disparate treatment case with alleged direct remarks, plaintiff cannot recover absent a showing that the discrimination was a determining factor in the adverse action taken against her. 424 Mich at 691.

In *Krohn v Sedgwick James of Michigan*, 244 Mich App 289; 624 NW2d 212 (2001), a unanimous Court of Appeals adopted the four-factor test followed in the Sixth Circuit and other federal courts in Title VII cases for determining the relevancy of allegedly discriminatory remarks or "direct evidence":

> (1) Was the disputed remark made by the decision-maker or by an agent of the employer uninvolved in the challenged decision? (2) Was the disputed remark isolated or part of a pattern of biased comments? (3) Was the remark made close in time or remote from the challenged decision? (4) Was the disputed remark ambiguous or clearly reflective of discriminatory bias?

In *Cooley*, the Sixth Circuit reviewed its own prior precedent in *Phelps v Yale Security, Inc*, 986 F2d 1020 (CA 6), *cert den* 114 SCt 175; 126 LEd2d 135 (1993); *Mitroff v Xomox Corp*, 797 F2d 271 (CA 6 1986), and *Gagne v Northwestern National Life Ins Co,* 881 F2d 309 (CA 6 1989). Under that clear precedent, where remarks are isolated, stray, remote in time, ambiguous and/or made by an employee other than the decision-maker, courts exclude the remarks as irrelevant. Even if such remarks were deemed relevant, their prejudicial effects weighs against their admission and argues in favor of reversing jury verdicts taunted by their prejudicial effect, as the Court of Appeals observed in *Krohn*, 244 Mich App at 303:

> Remarks made by a single employee that are offered to show a discriminatory motive by a defendant corporation involve a particularly high risk of unfair prejudice. A biased comment by a company agent is especially inflammatory because of the jury's tendency to attribute an agent's comments to the company itself, regardless of whether the agent was involved in the adverse employment action at issue and regardless of whether the remark reflects or repudiates company policy. The risk of admitting evidence of a biased opinion made by an employee who is unrelated to the decision-making process is that, even if the remark is isolated, ambiguous, or remote in time, it unfairly suggests to the jury that the remark and its underlying motivation have the imprimatur of the employer.

Two of the five sporadic remarks by the former supervisor occurred more than two years prior to the alleged discriminatory failure to hire plaintiff into the AR position when she became physically able to return to work in May of 1994. Most, if not all, even those two not gracefully expressed, related to the supervisor's concerns about plaintiff's absences, not just from plaintiff's pregnancy complications, but also from "a complication with [plaintiff's] neck [when she] had to have a tumor removed" and during her father's illness and related to the legitimate business need of the supervisor to plan according if plaintiff experienced significant absences due to developing pregnancy complications. Such remarks from a non-BCBSM employee, too ambiguous and too remote in time to suggest any discriminatory animus from a supervisor who approved all of plaintiff's requested time off, as he did other pregnant employees, should have been adjudged insufficient to establish a discriminatory animus on defendant's part.

In short, the majority opinion below (since one judge concurred in result only) should have reversed the jury verdict on the ground that plaintiff failed to establish any nexus between ambiguous and remote remarks and the alleged employment decision in issue particularly where the use of prejudice ran high and the jury returned a tainted verdict.

B. THIS COURT SHOULD VACATE OR REDUCE THE JURY VERDICT ON ECONOMIC DAMAGES AND DELINEATE THE DUTY TO MITIGATE BY SEEKING SUITABLE ALTERNATIVE EMPLOYMENT

The per curiam opinion enjoys only a slender majority for the rationale on the issues of mitigation in discrimination cases, since one of the judges concurred in the result only. This case presents the Court with an opportunity to treat, for the first time, the issues of when an employee may remove him- or herself from the labor market in order to return to school on a sporadic basis, and of whether a job search conducted in conjunction with receiving unemployment compensation benefits some two years prior could fulfill the mitigation duty.

1. STANDARD OF REVIEW

This Court reviews a grant or denial of remittitur under an abuse of discretion standard. *Palenkas v Beaumont Hosp*, 432 Mich 527, 555; 443 NW2d 354 (1989), citing *Majewski v Nowicki*, 364 Mich 698, 700; 111 NW2d 887 (1961), and *Stevens v Edward C Levy Co*, 376 Mich 1, 6; 135 NW2d 414 (1965). One of the factors which this Court has considered in determining if a trial court abused its discretion in failing to grant remittitur is whether the verdict was unsupported by the proofs. *Palenkas, supra.* The proper standard in granting remittitur is not whether the verdict "shocks the conscience" but whether the evidence at trial supports the award. MRE 2.611(E)(1); *Palenkas,* 432 Mich at 557.

This Amicus urges this Court to find that the evidence offered at trial in support of plaintiff's fulfillment of her duty to mitigate avoidable losses was insufficient to support the jury's economic award.

2. REAFFIRMATION OF EARLIER PRECEDENT

In reviewing the denial of remittitur affirmed by the majority opinion below, the Court should correct the unfortunate reversal of the Court of Appeals decision in *Morris v. Clawson Tank Co*, 221 Mich App 280; 561 NW2d 469 (1997) (written by then Judge Taylor and joined by then Judge Corrigan), cutting off economic damages as of the date that plaintiff had ignored a recall notice from defendant two years after his discharge, following this Court's teachings in *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994). The Court of Appeals in Morris also reaffirmed a definition of the "like employment" followed in Michigan appellate decisions for several decades until Justice Brickley announced in *Morris* that the court could "find no reason to require a plaintiff to search for 'like employment,' as defined by the Court of Appeals." *Morris v Clawson Tank Co*, 459 Mich 256, 267; 587 NW2d 253 (1998).

Justice Brickley's opinion implied that the Court of Appeals panel in *Morris* had made its decision up out of whole cloth, when in fact it had rather carefully followed prior opinions in *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188; 390 NW2d 227 (1986); and *Higgins v Lawrence*, 107 Mich App 178, 181; 309 NW2d 194 (1981), citing cases from the 1930's forward with the same definition of "like employment" and the same principles of mitigation articulated in the Court of Appeals opinion in *Morris*, only to be overturned, probably because of the sympathetic plaintiff in *Morris*, who had been fired after returning to work within a month of the loss of one eye, and who had (with little education) diligently looked for work, but was forced to accept work (even janitorial work and seasonal work) at less compensation than he had earned as a general laborer with Clawson Tank.

This Amicus urges this Court to return to the better-reasoned view of precedent prior to the 1998 *Morris* decision and to confine Morris to its sympathetic facts.

3. FAILURE TO MITIGATE WARRANTS REMITTITUR

In the case at bar, plaintiff quit a subsequent job with BCN and removed herself from the job market altogether in order to return to school on a sporadic basis, taking classes completely unrelated to the insurance field. It is significant that the panel below found that her voluntary resignation did not rise to the level of a constructive discharge, and that plaintiff admitted at trial that she did not look for work at all or submit any employment applications after quitting. Yet plaintiff clearly had a duty to mitigate avoidable losses, even under the Supreme Court decision in *Morris, supra*: she did not have the right to remain underemployed in order to increase her litigation damages.

The decision below excuses plaintiff's utter lack of a prospective job search by referring to plaintiff's "decision to return to school full-time," perhaps reflecting that she had not actually effected that decision at the time of trial, some eighteen months after having made it. In a footnote, the decision refers to defendant's argument that plaintiff had not even returned to school full-time and illogically claims: "This fact is irrelevant because plaintiff's damages were based on four years, i.e., the time it should take a full-time student to obtain a bachelor's degree." If the panel meant that plaintiff received no more than four years of economic damages to permit her to educate herself to gain an entry position in the insurance field outside of the BCBSM umbrella license, that formulation of the duty to mitigate remains erroneous. Mitigation represents a cutoff or an offset against damages. The panel below seems to apply an offset by the number of years of purported back pay the award suggests in a circumstance where no mitigation at all occurred, except for a half year period when plaintiff complied with the work search requirement in order to collect unemployment compensation.

In addition, because the panel below erroneously termed the application of the BCN medical leave policy a "decision to discharge" by BCBSM, the Court of Appeals concluded that plaintiff had met her duty of mitigation when she conducted, almost two years before she quit, a thin search for employment so that she could comply with the unemployment compensation work search requirement, which, as defendant points out in its application and as this Amicus incorporates here, should not suffice to fulfill her mitigation duty .

The opinion below refuses to cut off economic damages for a plaintiff who quit reemployment with BCN after collecting unemployment compensation under circumstances that the panel below specifically found did not constitute constructive discharge to take martial arts classes and an occasional college course at night. Under these circumstances, this Amicus suggests that the Court should hold that an employer need not establish the availability of comparable employment where a plaintiff has admitted that [s]he made no effort to seek employment. *Greenway v Buffalo Hilton Hotel*, 143 F3d 47, 54 (CA 2 1998); *Weaver v Casa Gallardo, Inc*, 922 F2d 1515, 1527 (CA 11 1991); *Sellers v Delgado College*, 902 F2d 1189, 1193 (CA 5 1990). This Court should not require what would in essence amount to a waste of time, MRE 403: a defendant employer should not need to clutter a trial record with expensive expert testimony on job availability where a plaintiff has admitted, in essence, [s]he had removed him- or herself from the labor market altogether.

The jury award of $125,000 for past economic damages and $136,000 for future economic damages should not stand, given plaintiff's admission that she looked for no work after voluntarily quitting the subsequent BCN job. This Court should vacate the verdict for past and future economic damages on the ground that plaintiff's abandonment of a job and of the labor market to attend college on a very sporadic basis by taking courses unrelated to the insurance field was unreasonable as a matter of law. The Court of Appeals abused its discretion in failing to remit plaintiff's

economic damages after she voluntarily quit employment and ceased to look for work. This Court should adopt the rule clearly stated in other jurisdictions that a plaintiff who quits a subsequent job voluntarily (as the majority below found plaintiff had) must undertake a prospective effort to look for work and cannot "remain unemployed and collect a windfall." *Sugg v Service Master Educational Food Management*, 72 F3d 1228, 1233 (CA 6 1996). See: *Brady v Thurston Motor Lines, Inc*, 753 F2d 1269, 1278 (CA 4 1985) (plaintiff who voluntarily quits employment without cause loses entitlement to back pay); *NLRB v Pepsi Cola Bottling Co of Fayetteville, Inc*, 258 F3d 305, 310-11 (CA 4 2001) (reasonable to preclude back pay where plaintiff never attempted to obtain suitable employment on the ground that finder of fact could do no more than speculate what plaintiff would have earned as a result of diligent job search); *EEOC v Delight Wholesale Co*, 973 F2d 664, 670 (CA 8 1992) (plaintiff who voluntarily quit not entitled to back pay from that date forward where no reasonable diligence to mitigate damages). Nor can a plaintiff remain underemployed and fulfill his duty to mitigate, *Morris, supra*, whether by simply looking through wants ads or by registering with the state unemployment compensation agency, *EEOC v Service News Co*, 898 F2d 958, 963 (CA 4 1990) (want ad search, without more, insufficient); *Booker v Taylor Milk Co, Inc*, 64 F3d 860, 865 (CA 3 1995) (plaintiff did not fulfill duty to mitigate by searching wants ads and registering with job service).

Under the circumstances at bar, the economic damages award is at best speculative and cannot be justified where plaintiff quit a job and failed to look for work. To approve the award sends a dangerous signal to plaintiffs: that they can do nothing and collect damage award many times their annual salaries.

C. THIS COURT SHOULD VACATE THE JURY VERDICT FOR NON-ECONOMIC DAMAGES AND DELINEATE THE SUFFICIENCY OF PROOF FOR EMOTIONAL DISTRESS DAMAGES

The opinion below offers no majority on the issue of the quantum and/or type of proof necessary to sustain a non-economic damage award, since one judge concurred in the result only. The Chamber believes that this Court should vacate and/or reduce the emotional distress portion of the jury verdict for the reasons stated in the dissenting opinion.

The jury awarded plaintiff $90,000 for emotional distress damages, an amount over four times her annual salary of $22,000 at BCN (143-144a). Plaintiff relied at trial only upon her own subjective testimony of emotional distress and humiliation, without regard for establishing whether her distress stemmed from job loss or from the sting of pregnancy discrimination.

1. STANDARD OF REVIEW

This Court reviews a denial of remittitur relating to unliquidated damages under an abuse of discretion standard, reviewing the verdict in the light most favorable to the plaintiff. *Palenkas*, 432 Mich at 555-556. Recognizing that no exact mathematical formula or standard by which emotional distress and other personal injury damages may be calculated, this Court nonetheless reviews emotional distress damages, not under a "shocks the conscience" standard, but for sufficiency of the proofs adduced at trial. *Id.* Where a jury's unliquidated damage award exceeds the highest amount supported by the evidence, then remittitur may be granted. *Wilson v General Motors Corp*, 183 Mich App 21; 454 NW2d 405 (1990) (plaintiff offered no evidence other than his own testimony on emotional distress damages, which could not sustain the award; therefore, trial court did not abuse its discretion in reducing $750,000 by half).

2. PROOFS DO NOT SUPPORT EMOTIONAL DISTRESS AWARD

At trial, plaintiff offered no testimony other than her own. Her thin trial testimony established little more than her "humiliation" at returning to BCN employment and answering coworker questions about why she did not get the AR job. (155a, 164a, 168a). She offered no testimony about her personal life; in fact, she bridled when questioned by defense counsel and indicated that her personal life was "fine" and irrelevant to her lawsuit. (246a) She admitted that her supervisor and her coworkers were "excellent," and that she did not endure scorn for having not received the BCBSM marketing position (183-184a). As the dissenting opinion indicates, such thin evidence proved insufficient in *Wiskotoni v Michigan Nat'l Bank-West*, 716 F2d 378, 389 (CA 6, 1983) (applying Michigan law), to demonstrate compensable emotional distress damages. Here, plaintiff did little more than offer evidence that she felt humiliated by job loss, without the lasting depression or dysfunction in major life activities associated with higher awards of emotional distress damages. See, e.g., *Eide v Kelsey-Hayes Co*, 431 Mich 26; 427 NW2d 488 (1988). Where there is no corroborative expert testimony and a plaintiff offers only her subjective feelings of emotional distress, then remittitur is justified. *Wilson*, 183 Mich App at 40.

Where plaintiffs offer such thin and subjective evidence without corroboration, federal courts scrupulously analyze emotional distress damage awards. *Price v City of Charlotte, North Carolina*, 93 F3d 1241, 1250-51 (CA 4 1996) (reversing $3000 emotional distress awards to each of seven officers who relied only upon their own testimony that each felt "betrayed" or "embarrassed" or degraded" when they were not promoted, in the absence of any physical symptoms, change in conduct, or psychological disturbance or counseling); *Brady v Fort Bend County*, 145 F3d 691(CA 5 1998) (plaintiffs' conclusory and completely subjective testimony that each felt upset and experienced sleeplessness, nervousness, weight loss or loss of appetite held insufficient explanation

of manifestation of emotional harm or its severity to justify damage award); *Nekolny v Painter*, 653 F2d 1164 (CA 7 1981) (reversal of emotional distress award based solely upon plaintiff's own testimony that he was "depressed," "a little despondent," and "completely humiliated" as insufficient to establish injury); *Spence v Board of Education*, 806 F2d 1198 (CA 3 1986) (remittitur affirmed where plaintiff did not lose esteem of peers, suffered no physical injury and received no psychological counseling).

Even more significantly, plaintiff offered no evidence to show a nexus between the sting of discrimination and her emotional distress, as would be required under Michigan appellate decisions. In *Slayton v Michigan Host*, 122 Mich App 411, 416; 332 NW2d 498 (on remand) (1983) (quoting from *Freeman v. Kelvinator, Inc*, 469 F Supp 999, 1000 (ED MI 1979), the court noted that claims of emotional distress due to discrimination survived preemption under the worker's disability compensation act precisely because "[t]he discrimination injury is unique." In *Freeman*, Judge Feikens, who formerly served on Michigan's civil rights commission, described at length the special sting of discrimination. Id. The *Slayton* court then found compensable emotional distress damages under the Elliott-Larsen Civil Rights Act only those "damages for any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish which flow from the discrimination injury." The trial record lacks any testimony showing that the humiliation plaintiff experienced after she was not placed in the AR job flowed from the sting of pregnancy discrimination.

Under these circumstances, this Court should find that the trial court abused its discretion in failing to grant defendant's request for remittitur. In so finding, the Court should reaffirm the principles articulated in *Palenkas* and *Slayton*, that emotional distress awards should be supported by detailed proofs and not by mere conclusory testimony by plaintiff, and that testimony linking the distress to the sting of discrimination is required.

RELIEF REQUESTED

The Chamber requests that this Court reverse the Court of Appeals decision on some or all of the grounds discussed in defendant's Application and in the briefs of this and other Amici and 1) set aside the judgment below and dismiss plaintiff's case for failure to establish disparate treatment pregnancy discrimination, and/or 2) cut off plaintiff's economic damages as of the date plaintiff voluntarily quit her employment or otherwise reduce those damages, and/or 3) vacate or reduce the award of emotional distress damages.

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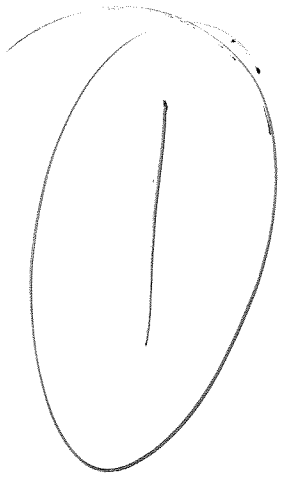
Dated: October 25, 2002



STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER MOOREHEAD,

Plaintiff-Appellant,

v

COMERICA, INC.,

Defendant-Appellee.

UNPUBLISHED
October 31, 2000

No. 203675
Wayne Circuit Court
LC No. 95-532170 CL

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant summary disposition in this case alleging wrongful termination and failure to accommodate under the Persons with Disabilities Civil Rights Act[1] (PWDCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* We affirm.

I

The facts viewed in a light most favorable to plaintiff are that, in 1980, plaintiff began employment as a cash deposit processing teller with Manufacturers National Bank (Manufacturers), and after several years was promoted to group leader of the cash deposit processing tellers. In June 1992, Manufacturers merged with defendant Comerica, and plaintiff became a Comerica employee.

Plaintiff testified that she left work early on September 19, 1994, that she did not feel well that day, that when she got home "that's when I knew something was wrong," and that she had no idea at the time whether she would be gone a short or long time. Plaintiff soon after consulted with Dr. Chalakudy Ramakrishna, a psychiatrist, who stated in a letter to defendant that plaintiff was under his care for an adjustment disorder and that he had advised her to not work for five

[1] At the time this suit was brought the act was known as the Handicappers' Civil Rights Act (HCRA). The act was amended by 1998 PA 20, effective March 12, 1998, and renamed to the Persons with Disabilities Civil Rights Act. The PWDCRA is substantially similar to the HCRA, one of the differences being that the terms "handicap" and "handicapper" were replaced by "disability" and "person with a disability," respectively.

weeks. Dr. Ramakrishna testified that plaintiff's adjustment disorder resulted from the stress of her teenage daughter being very ill, of plaintiff's caring for her, the frustration of seeing multiple doctors who gave varying information, and her daughter's poor reaction to her own illness, compounded with plaintiff's job stress. Dr. Ramakrishna wrote to defendant several other times, including on December 5, 1994, stating that plaintiff should refrain from working for another eight weeks.

On March 9, 1995 plaintiff saw Dr. Ramakrishna and he stated in a note, which plaintiff provided her supervisor, Marilyn Henry, that plaintiff would be unable to return to work until April 30, 1995. On the afternoon of Wednesday, March 15, 1995, plaintiff received by mail two letters in one package, from Susan Janeczek, one of defendant's benefits representatives. One of the letters was dated March 14, 1995, and the second was dated February 16, 1995. It is undisputed that defendant initially sent the latter letter to the wrong address, that the post office returned the letter to defendant, and that defendant did not attempt to resend the letter or otherwise advise plaintiff of its contents until it mailed it to plaintiff with the second letter on March 14, 1995. Defendant's February 16, 1995 letter stated:

> Dear Jennifer,
>
> Our records reflect that you are on a medical leave of absence (short term disability) with a last day worked as September 19, 1994. If this is incorrect, please contact me immediately.
>
> This note reminds you that when an employee has been away from work 180 days, they subject [sic] to being separated from Comerica's payroll system and all benefits will cease at that time.
>
> This note also serves to inform you that you may be eligible to apply for Long Term Disability (LTD). Applying for LTD provides you with a possible source of income in the event that you are seriously ill and unable to return to your job. However, submission of an application does not guarantee approval. Because the process may take 30 or more days, it is advisable to apply as soon as you are aware that your medical leave will extend over the 180 day period.
>
> If approved, your LTD benefits would be come [sic] effective on or about March 19, 1995 and would provide you with 60% of your monthly base salary as of your last day worked. You elected an after-tax premium, so your approved LTD benefit will be tax free to you. However, please be aware that any other compensation you might receive (such as Social Security, Retirement, et al. [sic etc.]) will reduce your LTD benefit.
>
> To apply for LTD, complete the attached Employee's Application for Benefits and have your doctor(s) complete the Attending Physician's Statement(s). Then return all the forms in the pre-addressed envelope.

Also enclosed is a copy of our LTD Information Sheet containing LTD Plan information. Please read it carefully and keep it for reference.

In the meantime, if you have any questions, you may contact me, at the number provided below.

Sincerely,

Susan Janeczek
Benefits Representative
Human Resources -MC 3126
1-313-222-7027

Defendant's March 14, 1995 letter stated:

Dear Jennifer,

Our records indicate that your last day worked was September 19, 1994. It is company procedure to remove an employee from the payroll records after 180 days of medical or workers' comp leave time. Therefore, I must separate you from the payroll system effective March 19, 1995.

Upon separation from payroll, all benefits will cease. However, if you wish to continue your employee medical, dental and/or vision benefits, you may do so through Comerica's COBRA program . . . .

If you have questions or need assistance, please don't hesitate to call me. I can be reached at 1-313-222-7027 between 8:00 a.m. and 4:30 p.m. Monday through Friday.

Sincerely,

Susan Janeczek
Benefits Representative
Human Resources-M/C 3126

Plaintiff testified at deposition that immediately upon receiving the two letters from defendant on the afternoon of Wednesday, March 15th, she called Susan Janeczek, got her voice mail, and left a message saying that she did not understand the package regarding benefits she had just received and asked that Janeczek call her at home. Plaintiff testified that she did not know what the letter meant and did not understand that her employment was going to be terminated. She testified that she thought that "separation from payroll" meant that she would be placed on unpaid leave status, which was her understanding of what would occur under the Manufacturers policy. Plaintiff also testified that on that same afternoon, Dorothy Ross, Ms. Henry's supervisor, called her because she had received a copy of defendant's letter of March 14, 1995. Plaintiff testified that Ross said to plaintiff that she did not know what "separated from payroll" meant, that she "was in the middle," and that she would call plaintiff back after speaking with the Human

Resources Department. Plaintiff also testified that on that afternoon, after speaking with Ross, she again called Janeczek, got Janeczek's voice mail, and then dialed zero to speak to someone. She testified that she spoke to Jeff Rosen, later identified as Jeff Rhoads,[2] told him who she was, that she was on medical leave, that she received the letters in the mail, read the March letter to him, and asked what she needed to do. Plaintiff testified that the man named Jeff told her that she needed a doctor's excuse to be able to return to work. Plaintiff testified that after speaking with Jeff, she called Dr. Ramakrishna, left a message, and that he called her back either that day or the next day, that he told her she would have to see him in order to get a return to work note, and that she made an appointment to see him on Monday, March 20, 1995.

Henry testified at deposition that before plaintiff was terminated on March 19, 1995, plaintiff called her and told her she was able to return to work and would return on March 21, 1995. Henry testified that she believed that it would be okay for plaintiff to return to work on that date, that she was surprised when she did not see her on that date, but that she did not tell plaintiff that it was okay for her to return because she did not "have the authority to . . . make that call." Henry testified that she did not tell anybody at the bank about her conversation with plaintiff that she would return on March 21, 1995. When defense counsel examined Henry at deposition, and asked her whether she was "certain that your conversation with Miss Moorehead relating to her being able to return to work by the 21st took place before she was terminated, or are you not certain of the timeframe [sic]?" Henry responded "I'm not a hundred percent certain."

Plaintiff testified that after she left Dr. Ramakrishna's office on Monday, March 20, Ms. Ross called her at 4:50 p.m., she explained to Ross that she had her doctor's letter saying she could return to work, and Ross then told her that she was no longer a bank employee. Plaintiff testified that she asked Ross who she should speak to about the matter and Ross said plaintiff should speak to Dana Allison, a Human Resources consultant. Because it was nearly 5:00 p.m., plaintiff went to see Allison the following morning, March 21, 1995, and testified that she sat in the bank lobby waiting to see her for three hours, after which Allison spoke to her briefly in the hallway. Plaintiff testified that she showed Allison the letter from Dr. Ramakrishna, that Allison refused to take it, and said there was nothing she could do and that plaintiff should write the grievance department. Plaintiff testified that she then made an appointment with Allison's secretary so "she could explain to me what has happened to me," and rather than keep the appointment, the secretary called plaintiff and said no one could do anything for her.

By letter dated March 28, 1995, plaintiff wrote Allison asking to be reinstated, and sent copies to Ross and defendant's complaint department:

> Dear Ms. Allison:
>
> As my employment records reflect, I have been an employee at Manufacturer's Bank for 15 years. I commenced a medical leave of absence on September 19,

---

[2] Rhoads testified at deposition that he was the manager of the preferred compensation division of defendant's Benefits Department.

1994. I have diligently maintained contact with my employer since that date, providing letters from my physician.

During this period, and for years proceeding [sic] it, I was always led to believe an employee in my circumstances would be protected from termination of employment for up to one year. No one ever told me otherwise.

On March 16, 1995, I received two letters from Susan Janeczek, one dated February 16, 1995 and the other March 14, 1995, both received in the same envelope. These letters were telling me I was to be terminated March 19, 1995.

I spoke to Jeff Rosen on March 17, 1995 at which time he explained that if I submitted a return to work letter from my doctor, I could commence work immediately. March 19th was a Sunday, and having so little notice as to the time constraints being put on me, I saw my doctor March 20th.

I called Marilyn Henry that same day in the early morning and said I would be able to return to work the next day March 21st she said ok. Later that day I received a call from Dorothy Ross who informed me I could not return to work.

I believe my treatment is unfair and unduly harsh. *Please consider this my formal request to be reinstated immediately.* I am available for immediate employment. If Comerica elects not to reinstate me, then please consider this my request to invoke my rights to file a grievance. As I have no copy of the company grievance procedures, please forward them to me and let me know what additional steps must be taken to process this grievance.

I trust following through with this grievance won't ultimately be necessary and you will elect to reinstate me.

I can be reached at [phone number] or by mail at [address]. [Emphasis added.]

Plaintiff testified that she received no response to this letter.

II

Defendant's motion for summary disposition or partial summary disposition, brought under MCR 2.116(C)(4), (8) and/or (10), argued that plaintiff had no standing to sue under the PWDCRA because on the day of her termination she was certified as unable to work; that even if plaintiff had standing, she received a reasonable time to heal as a matter of law; that to the extent plaintiff sought to compel defendant to alter the medical leave of absence period, which is the qualifying period under its Employee Retirement Income Security Act (ERISA)-governed LTD plan, any such extension by judicial fiat would be preempted under ERISA, 29 USC § 1001 *et seq.*; that plaintiff could not establish discriminatory intent or show that defendant's reason for not varying its medical leave period was a mere pretext for discrimination; and that defendant was entitled to partial summary disposition regarding plaintiff's damages because she removed herself from the job market and was laid off from a subsequent job, and because plaintiff could not

establish a nexus between the alleged discrimination and the claimed emotional distress and failed to mitigate such alleged distress.

Plaintiff argued in her response brief that her adjustment disorder constituted a handicap under the PWDCRA; that questions of fact existed regarding whether she was able to perform her duties on the date defendant administratively terminated her; and that but for defendant's actions prior to her termination, which were designed to and did prevent her from returning before March 19, 1995, she would have been medically released and on the job before 180 days elapsed. Plaintiff argued that she never alleged that defendant failed to afford her a reasonable time to heal and that the issue was irrelevant. Plaintiff also submitted an affidavit, which stated that after her termination she applied for unemployment benefits but did not receive them because defendant contested her eligibility, and that she was thus without income and unable to hire a caregiver for her daughter. Plaintiff also argued that defendant's personnel policies did not *require* that it terminate employees after 180 days of medical leave, and that since defendant raised the issue of ERISA after discovery closed, she had not had opportunity to conduct discovery, but that, in any event, it was unlikely that further discovery would support defendant's argument because plaintiff was not requesting that payment under the plan be increased to allow her additional pay. Plaintiff further argued that there was evidence of defendant's animus toward her and the handicapped as a class.

Defendant's reply brief to plaintiff's response argued that John Graham, defendant's First Vice President of Benefits and Operations, testified at deposition that defendant strictly adheres to the 180-day leave period since it is also the qualifying period for long-term disability benefits, and that it would be a breach of defendant's duties under ERISA if it attempted to administer the LTD plan in any other way, and that this testimony was uncontroverted. Defendant further argued that

> Plaintiff complains that two letters sent to her, one reminding her that she should timely apply for LTD benefits if her medical disability was to extend past 180 days and the other a COBRA notice, were not received until shortly before the expiration of her leave. However the concept that these were some form of warning letters, warning plaintiff to recover from her disability before 180 days or face administrative termination, was completely foreign to John Graham, First Vice President, Benefits and Operations. Instead, Graham testified that these letters were intended to inform plaintiff about available benefits if her disability continued. Graham's understanding is clearly correct, since a person either is or is not disabled – it simply is not a discretionary matter left to the employee. The line between "disabled" and "not disabled" is not an ambiguous, ill-defined line in the sand. A medical care provider must certify that a person is disabled and must also certify that the person's disability has subsided sufficiently for that person to return to work.

Defendant's reply brief also noted that, contrary to plaintiff's argument, she was not terminated for failure to comply with defendant's medical leave policy, but rather, she had enjoyed the benefits of the policy for the full 180 days allowed.

The circuit court's order states that it granted defendant's motion "for the reasons and on the grounds raised in the briefs in support of defendant's motion . . . and raised by defendant at the hearing on the motion held on December 16, 1996."[3]

III

Plaintiff first argues that a question of fact exists on the issue whether her disability prevented her from performing her job duties on March 19, 1995, the day defendant administratively terminated her. In response to defendant's motion, plaintiff submitted Dr. Ramakrishna's affidavit, in which he stated that had he known sooner that plaintiff was facing termination, he would have cleared her to return to work as early as February 16, 1995:

> 2. Jennifer Moorehead was my patient for the treatment of a stress-related disorder from September 29, 1994 through April 13, 1995.
>
> 3. By February 16, 1995, Jennifer Moorehead had recovered sufficiently so that if asked by Ms. Moorehead and/or her employer, I would have released her to return to work in order to avert the loss of her employment.
>
> 4. I would have maintained contact with her by increasing the time between sessions and/or monitored her condition by telephone.
>
> 5. The loss of her employment after February 16, 1995, presented a more psychologically detrimental event than a closely monitored return to work.

Defendant argues that it should be permitted to rely on the only medical certification it had on March 19, 1995, the date it administratively terminated plaintiff, in which Dr. Ramakrishna stated that plaintiff would be unable to work until April 30, 1995.

We review the circuit court's grant of summary disposition under MCR 2.116(C)(10)[4] de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The circuit court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the party opposing the motion. *Id.* The moving party bears the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* at 455, citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). If the opposing party fails to do so, the motion is properly granted. *Id.*

[3] The circuit court heard argument on defendant's motion on December 16, 1996, and also heard argument on January 24, 1997 and April 9, 1997. On April 21, 1997, the circuit court granted summary disposition, stating from the bench "the court will adopt the brief and the oral argument of the defense as the basis for my decision." The only transcript in the lower court record is the January 24, 1997 hearing on defendant's motion. There is no dispute that the parties attempted to secure the other two transcripts, and were unable to do so through no fault of either party.

[4] The circuit court did not specify under what subrule it granted defendant's motion, but adopted defendant's briefs and argument below, which were brought under MCR 2.116(C)(4), (8) and (10). We thus review the motion as granted under MCR 2.116(C)(10).

The PWDCRA prohibits discrimination against individuals because of handicap. *Id.* The PWDCRA makes it illegal for an employer to discriminate against an individual in hiring, recruiting, promoting, discharging, or with respect to compensation or the terms, conditions, or privileges of employment because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position. MCL 37.1202(1)(b); MSA 3.550(202)(1)(b). An employer is also prohibited from limiting, segregating, or classifying an employee or applicant for employment because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. MCLA 37.1202(1)(c); MSA 3.550(202)(1)(c).

To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must establish that she is handicapped as defined in the act, that the handicap is unrelated to her ability to perform the duties of a particular job, and that she has been discriminated against in one of the ways set forth in the act.[5] *Stevens v Inland Waters, Inc*, 220 Mich App 212, 215; 559 NW2d 61 (1996). If the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a nondiscriminatory reason for the adverse employment action. *Rollert v Civil Service Dep't*, 228 Mich App 534, 538; 579 NW2d 118 (1998). If the employer articulates such a reason, the burden shifts to the plaintiff to show that the employer's articulated reason(s) were a mere pretext. *Id.* Pretext may be established in one of three ways; by showing that 1) the reason(s) had no basis in fact, 2) if the reason(s) had a basis in fact, by showing that they were not the actual factors motivating the decision, or 3) if they were the factors, that they were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Assuming arguendo that plaintiff established a prima facie case of discrimination, i.e., established that questions of fact remained on the question whether on March 19, 1995 her handicap was unrelated to her ability to perform her job duties, we conclude that her claim fails because she did not meet her burden of showing that defendant's articulated reason for discharging her was pretextual.

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[5] The PWDCRA defines a "handicap" as follows:

> A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . substantially limits [one] or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.1103(e)(*i*)(A); MSA 3.550(103)(e)(*i*)(A).]

The phrase "unrelated to the individual's ability" means that with or without accommodation, an individual's handicap does not prevent him or her from performing the duties of a particular job or position. MCL 37.1103(l)(*i*); MSA 3.550(103)(l)(*i*). Major life activities are basic functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. *Lown v JJ Eaton Place*, 235 Mich App 721, 729; 598 NW2d 633 (1999); *Stevens*, *supra* at 217.

Plaintiff testified at deposition, and defendant assumed for purposes of its motion, that plaintiff did not receive a Comerica employee handbook, and that Manufacturers' policies applied to her.[6] Manufacturers' policy on extended sick leave[7] stated in pertinent part:

> Extended Sick Leave
>
> If a medical disability, including pregnancy, prevents you from working for five or more consecutive days, you may be granted an extended sick leave. The first five days of absence are considered part of the leave.
>
> The maximum amount of leave time for which you are eligible is based on your consecutive length of service, as shown in the chart below. The chart also shows the number of weeks your salary will continue if you are a full-time, salaried employee. . . .
>
> Any paid days of absence you have taken during the preceding 12 months will be subtracted from your available paid time. . . .
>
> [The chart provided that employees with ten or more years of service had a maximum of twenty-six weeks of sick leave in a twelve month period, with all twenty-six weeks being fully paid, and zero weeks at half paid and unpaid. Employees with five to ten years of service had a maximum of twenty-six weeks of sick leave, with a portion of the weeks being fully paid, a portion half paid, and a portion unpaid.]
>
> Medical documentation must be provided in order for you to be eligible for a leave. It may also be required at various intervals during the leave, depending on the length of time you are out. *When you are ready to come back to work, you must supply a doctor's letter which indicates that your health permits your return.* Because the Bank wants to make sure that performing your job will not jeopardize your health, you will not be allowed to work until such medical evidence is provided. In certain circumstances, the Bank might want to have a physician of its choosing examine you, as well. In these circumstances, your leave or reinstatement is conditional upon approval by the Bank's physician.
>
> *The extended sick leave program is designed to correspond with the Long Term Disability plan*, which is described in the Summary Plan Description at the rear of

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[6] Plaintiff testified that her understanding was that Manufacturers' policies applied to her, and that she understood that her job would be protected as long as her medical leave lasted less than one year. She testified that her understanding was that after a certain amount of time, her salary and benefits would be reduced, and then she would go to unpaid status, while maintaining benefits, but not be terminated. Plaintiff also testified that Henry, one of her supervisors, told her that as long as she kept her doctor letters current and everything was in place, plaintiff would be fine.

[7] The policy in the lower court record is dated November 1989.

this handbook. *If you exhaust your total leave time and are unable to work, you will be removed from the Bank's records.* However, if you are a participant in an LTD plan, and you meet the qualifications for benefits, you would be eligible to receive them. [Emphasis added.]

The lower court record contains a letter from Manufacturers to plaintiff dated January 16, 1987, regarding a medical leave of absence plaintiff was on at that time. The letter stated in pertinent part:

> We understand that you are on a medical leave of absence, and hope that you are soon recovered. As a matter of practice, we like to communicate in writing with all employees on leave. The purpose is to ensure that the employee has an understanding of the guidelines upon which the leave is based, and an opportunity to question any unclear points. Much of the information contained in this letter will probably have been conveyed previously to you by your management.
>
> At the beginning of your leave of absence and approximately every thirty days thereafter, a doctor's letter must be submitted indicating the nature of your disability, the date the disability began and its expected duration. When you are ready to come back to work, you must supply a doctor's letter which indicates that your health permits your return. Because the Bank wants to make sure that performing your job will not jeopardize your health, you will not be allowed to work until such medical evidence is provided. Likewise, you are expected to return to work as soon as your doctor releases you.
>
> *The maximum amount of leave time available to you is based on seniority and is outlined on page B6 of your Employe Handbook. In the event that you are unable to return before your time is exhausted, your employment would be terminated.* However, you may be eligible for LTD benefits, and should contact the Benefits Division if this appears to be a possibility. *You would also be welcome to reapply for a position upon your recovery.* [Emphasis added.]

Susan Janeczek, defendant's benefits representative who sent plaintiff the two letters in March 1995 that are quoted above, testified that she recalled either speaking with plaintiff or getting a phone message from her. She testified that she subsequently spoke to Jeff Rhoads, and that she recalled Rhoads saying "once she has a doctor's note to return to work, there has to be a release. Then we could reinstate her. Or if it was prior to the separation date, then there will not be a separation." Janeczek further testified:

> *Q.* What was your understanding if the person had the doctor's release after the separation date, after the person had already been separated?
>
> *A.* After they had already been separated, then they would have a doctor's release.
>
> *Q.* Correct.

Defendant thus articulated a legitimate non-discriminatory reason for plaintiff's administrative termination. Plaintiff thus had the burden of showing that defendant's articulated reason was a mere pretext. Plaintiff presented no evidence that defendant's extended medical leave policy was not uniformly applied. Plaintiff presented no evidence to rebut that employees that utilized the maximum allowable medical leave time and did not provide a return to work certification before the designated time elapsed were administratively terminated. Plaintiff provided no evidence that her termination was for any reason other than pursuant to that policy, nor did she present admissible evidence to contradict the testimony of defendant's agents that to their knowledge, no employee had been allowed to extend a medical leave of absence beyond 180 days absent a timely doctor's certification. Plaintiff points to no evidence to support that Manufacturers at any time had had a policy that protected employees on medical leave from termination as long as the leave did not exceed one year.

Under these circumstances, we conclude that plaintiff did not present evidence from which a reasonable juror could infer that defendant's reason for plaintiff's termination was a pretext for discriminating against her on the basis of her disability or against persons with disabilities as a class. Dismissal of plaintiff's wrongful termination claim was thus proper.

IV

Plaintiff also argues that questions of fact exist regarding whether an additional day of accrued vacation or personal time would have constituted a reasonable accommodation and whether "the employer would have been unduly burdened by this request." We decline to address this issue because plaintiff unequivocally waived any accommodation claim at her deposition and did not otherwise argue it in the lower court.

Assuming arguendo that plaintiff properly pleaded an accommodation claim in her complaint,[8] she clearly waived that claim during the discovery phase of the litigation. At plaintiff's deposition, plaintiff's counsel unequivocally stated that it was not pursuing an accommodation claim:

> [Defense counsel]: What accommodation were you seeking for your handicap that [defendant] didn't give you?
>
> [Plaintiff]: I don't understand what that means.
>
> [Defense counsel]: Is this basically – then it's not an accommodation case? Or what are you doing?

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[8] In paragraph sixteen of plaintiff's single count complaint entitled, "Violation of the Michigan Handicapper's Civil Rights Act," plaintiff alleged that "[t]he reasons given for plaintiffs termination from [defendant] are pretextual in nature, and are designed to avoid responsibility for employing an individual with a handicap or a perceived handicap, *or otherwise accommodating the individual with the handicap*" without further explanation. (Emphasis added.)

[Plaintiff's counsel]: No. At that point, she was not asking for accommodation. Had they re-employed her, maybe she would have said I can't do the block at this point.

[Defense counsel]: We are not – it's not an accommodation case?

[Plaintiff's counsel]: *It's not an accommodation case, no.*

[Defense counsel]: *I'm sorry. Since it was pled, I thought I would be sure. With that stipulation in mind as to [¶ 16 of the complaint], then I don't have to question her any further on that.* [Emphasis added.]

As evidenced in part by this exchange, defense counsel relied on plaintiff's representation and ceased questioning concerning the accommodation claim. Moreover, there is no indication that plaintiff attempted to retract the waiver at any time during discovery or that she sought to amend the complaint pursuant to MCR 2.118(A) to add an accommodation claim.

Nor can we conclude that plaintiff raised the accommodation issue in response to defendant's motion for summary disposition. Consistent with plaintiff counsel's representation at

irrelevant.[9]

The record therefore establishes that plaintiff clearly represented to both defense counsel and the trial court that her claim under the PWDCRA was not predicated on a failure to accommodate. Defendant had a right to rely on, and apparently did rely on, that representation by ceasing questioning at the deposition concerning any alleged failure to accommodate, by deciding not to conduct further discovery on the issue, and by not pursing that claim further in its subsequent motion for summary disposition. Further, the record is void of any indication that plaintiff otherwise raised the issue, now advanced on appeal, below or that the issue was decided by the trial court. It is well established that "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). See also *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 484 NW2d 791 (1992) (an issue not raised before and considered by the trial court is not properly preserved for appellate review). Accordingly, we hold the accommodation issue waived, *Phinney*, *supra* at 544, and decline to consider it on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

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[9] As noted above, in that section, plaintiff argued that she never alleged that defendant failed to afford her a reasonable time to heal and that the issue was irrelevant. Plaintiff then stated "[a]ssuming arguendo that [she] had alleged that she was entitled to further time in which to return, it is likely that she would prevail," citing her affidavit indicating that she had accrued vacation and personal time, one case for the proposition that the use of such time constituted a reasonable accommodation, and the Americans with Disabilities Act (ADA), 42 USC § 12101 *et seq.*